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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 417

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

SYLVANIA ELECTRIC PRODUCTS, INC., *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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STATEMENT

On September 18, 1961 the National Labor Relations Board (herein called the "Board") filed a petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. On October 2, 1961 the time for filing a brief in opposition to the petition was extended to November 19, 1961.

Petitioner's statement of "the Board's Findings of Fact", although fairly complete, is inaccurate in certain respects. Contrary to the assertion that "The Company conceded during the negotiations that the cost of the insurance program was *material* in the determination of its bargaining position" (Pet. 4, italics supplied), the stipulated facts in the record, as adopted

by the trial examiner and Board, revealed no more than that "The Respondent has always *taken into consideration* the cost of those benefits in arriving at the level of benefits to be offered to the employees" (italics supplied) (JA 12, 14, 44). An erroneous impression is also conveyed by the statement (Pet. 4) that "its [the Company's] manager of industrial relations testified that much of the cost information sought by the Union could have been made available, but the Company nonetheless refused at all times to supply such information". This statement seems to imply that definite figures on the cost of insurance for the Seneca Falls plant were in Respondent's possession when the Union request was made. As the record discloses (JA 54-55) and the trial examiner found, however, the net cost to the Company of its insurance program is not known at the time the premiums are paid to the insurance carrier (JA 14, 54). Rather, the Company pays advance premiums on three different sets of policies, each of which covers employees on a multiplant basis including the Seneca Falls personnel (JA 14, 42, 54). Only at the end of the policy year are computations made to adjust the premiums in light of the claims incurred (JA 54).

Even the advance premium amounts are available only on a corporate basis (JA 51). To determine what portion of this estimated cost was allocable to Seneca Falls would involve actuarial computations as to the degree to which occupational hazards at that plant and the composition of its personnel (e.g., the ratio of the sexes, the average age of the workers) deviated from conditions typical in the other Sylvania plants covered by the respective policies (JA 51, 52). Thus the record permits no inference of bad faith with regard to the Company's refusal to grant the Union's request on

the ground (in addition to its legal reasons) that to do so would place "a severe burden on the personnel department". Nor did the Board *in its decision* make any such finding or implication (JA 2-37).

The summary (Pet. 5, 6) of the decisions of the Board and the court is also somewhat misleading. Nowhere in the Board's opinion is there reference to information "which must be available to both parties if there is to be meaningful collective bargaining", as the petition implies (Pet. 5). Instead, the Board found that under the Sylvania plan there inures to the employees "a benefit which constitutes an emolument of value . . . " (JA 34), which the Board deemed synonymous with or an integral part of "wages". Had it not been for Respondent's group insurance program, the Board surmised, the employees might have been required to allocate a portion of their wages for such purposes (JA 34). Hence the Board concluded (JA 35):

> "As the premiums paid by the Respondent constitute wages, it logically follows that the premium cost data requested by the Union relates directly to the matter of wages, and it appearing plain that this data was relevant to the Union's task as bargaining agent of Respondent's employees within the meaning of the cases, we conclude that the Respondent's refusal to furnish the requested data to the Union was violative of Section 8(a)(5) and (1) of the Act, as alleged in the complaint".

The court of appeals addressed itself to this proposition as well as to the "inarticulate premise" adverted to in the petition (Pet. 6). It reasoned (Pet. App. 22-23) that to define premium payments to a noncontributory insurance program as "wages" on the theory that otherwise the employees would pay for it "stretches our language in the *Cross* case about 'direct

and immediate economic benefits flowing from the employment relationship' too far, for it would expand the concept of wages so far as to break down if not destroy, the distinction drawn in the Act between 'wages, hours and other terms and conditions of employment,' as to which there is the mutual mandatory duty to bargain collectively, and those other matters as to 'which each party is free to bargain or not to bargain and to agree or not to agree.' *N.L.R.B.* v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958)."

THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

The question presented by this record does not warrant review by this Court on any of the grounds ordinarily applicable to the granting of writs of certiorari (Rule 19, Sec. 1(b)) to United States Courts of Appeals. The text of the opinion of the court below reveals no conflict with the decision of the Seventh Circuit in *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641. In fact, the court below expressly stated that if the insurance plan drawn into issue had been partly paid for by employee contributions, as was the case with the *Swift* plan, its decision would have been otherwise.[1] Far from presenting any

[1] The court said: ". . . Moreover, we might take another step and agree with the trial examiner that the cost of plans to which employees contribute constitutes 'wages' by reason of the direct effect of each employee's contribution upon his pay check". . . . (Pet. App. B, p. 22). Moreover, in the *Swift* case the employer did not refuse to give the union the information or contend that the union was not entitled to it. The company simply failed to give the union information it sought on wages, job classifications, to which it was admittedly entitled, as well as on the costs of a health and welfare plan, and the Board and the court treated the failure to act on both requests as *in pari materia*. *N.L.R.B.* v. *Swift Co.*, 277 F. 2d 641 at 643-4, and at 645. Thus the issue here on which the trial examiner distinguished the *Swift* case (JA 28, 29) was not even raised in the Seventh Circuit.

important Federal question, the instant decision below turned upon the narrow, precise determination of whether an employer's premium payments to a *non*-contributory group insurance program are "wages" within the meaning of Section 8(d) of the Act.

The record reveals that the employer, pursuant to the union's request, did supply information relating not only to the schedule of benefits, but also the actuarial data, and the claims incurred in the operation of the plan. It afforded the union an opportunity to bargain about details of the schedule during the contract negotiations which were the subject of the Board's decision. Nevertheless, the Board now advances the contention that effective collective bargaining with respect to insurance plans wholly financed by employers would be jeopardized if the decision of the court of appeals is permitted to stand.

It is significant, however, that although Section 8(a)(5) of the National Labor Relations Act has been in effect and forcefully administered since 1935, it was not until 1958—23 years later—that the Board has taken so broad a position on a question of disclosure. It can fairly be inferred from the hiatus in testing the issue that the asserted detriment to the bargaining process has been exaggerated. In any event, by focusing upon the asserted usefulness to a union of the requested information in the formulation of bargaining proposals, Petitioner has injected a wholly theoretical issue into this proceeding. Such a criterion is not mentioned in the Act nor relied upon in any respect by the Board in the decision reviewed and set aside by the court below.

1. The Issue Presented by Petitioner Is Academic

Whatever importance as a matter of public policy the basic question of an employer's duty to disclose the costs of employee welfare plans possessed when this controversy arose in 1958, has vanished by reason of the passage of the Welfare and Pension Plans Disclosure Act (effective January 1, 1959, 72 Stat. 997, 29 U.S.C. § 301 ff). As Petitioner states (Pet. p. 8, n. 5), this Act compels companies to furnish to the Secretary of Labor as a matter of public record detailed information with respect to their premium *costs* as well as their level of benefits. In pertinent part, Section 7 of the Act, 29 U.S.C. § 306(d)(1), requires that the employee report:

> "The premium rate or subscription charge and the total premium or subscription charges paid to each carrier or organization and the approximate number of persons covered by each class of such benefits."

Although the petition suggests that the employer need not report the allocation of costs to the components of its plan in cases where it contracts with only one insurance carrier, this interpretation would appear to negate the requirement of Section 7 that the employer furnish both "the premium *rate* . . . and the *total premium* . . . charges paid to each carrier . . . and the number . . . covered by *each* class of such benefits." (Italics supplied). Since the three Sylvania policies, although negotiated with the same carrier, did not cover completely identical sets of employees (JA 42), it is difficult to understand the contention (Pet. 8, n. 5) that the Company filed a more complete breakdown of premium costs than the statute required.

In any event, it is plain that the Disclosure Act does impinge upon the precise considerations of policy which the Board has presented in this forum. If in fact Sylvania's reluctance to furnish the information was a hindrance to the union, and if this aspect of the matter is at all relevant to the question before this Court, the future impact of such conduct upon bargaining positions is of course dependent upon the scope of reporting requirements or reporting practices under the Disclosure Act. The Board's contentions concerning the impairment of future collective bargaining are speculative because they are premature.

Although Petitioner has chosen to view Sylvania's current reports on file as "not adequate for collective bargaining", it is at least an open question whether its notion is shared by the Steelworkers Union at Sylvania, or by unions generally. It is more reasonable to believe that whatever misgivings, if any, a union may have as to undue cost of a counter-proposal to an employer, would be allayed by knowledge of the overall cost of the employer's insurance program obtainable under the Disclosure Act.

2. On the Only Issue Presented to It, the Court Below Was Plainly Correct

The Board in this forum has attributed importance to the case on the theory that unless the requested information is divulged "the employees and their union representative cannot intelligently formulate proposals for negotiation . . ." (Pet. 8), and that "the essential point remains that intelligent discussion of alternative benefit proposals is frustrated . . ." (Pet. 9). Such an issue was never raised in the court below nor, as pointed

out in our "Statement", did the Board rest its decision on such grounds. In fact, in its brief to the court of appeals the Board expressly stated that such considerations were irrelevant to the disposition of the case, stating (Br. 17, n. 7):

> "In addition, it is settled that there is no requirement of a special showing that information pertaining to the wage structure of an employer is relevant to a particular bargaining purpose of the Union in order to establish the necessity of making such information available to the Union. *N.L.R.B.* v. *Woolworth*, 352 U.S. 938, reversing 235 F. 2d 319 (C.A. 9); *Boston Herald-Traveler Corp.* v. *N.L.R.B.*, 223 F. 2d 58, 62-64 (C.A. 1); *N.L.R.B.* v. *Whitin Machine Works*, 217 F. 2d 593, 594, certiorari denied, 349 U.S. 905; *N.L.R.B.* v. *The Item Co.*, 220 F. 2d 956 (C.A. 5) certiorari denied, 350 U.S. 836."

In dismissing the case after hearing, the trial examiner, in reviewing the authorities which had previously held that employers were under a duty in collective bargaining about health and welfare plans to furnish unions upon request the data as to costs, observed that all the cases brought to his attention dealt with plans financed in part by deductions from employee wages. He therefore concluded that since the cost of these plans directly affected an employee's take-home pay, a refusal to state the cost was tantamount to refusal to disclose information on existing pay scales or wage incentive plans.

The rationale of such decisions was that the information was necessary to enable a union to bargain on wages and because the statute requires collective bargaining on "wages, hours, and other conditions of employment", an employer who withholds such informa-

tion is removing a mandatory subject of discussion from the bargaining table. The trial examiner held that the rationale of those cases was not applicable to bargaining within the framework of a plan wholly financed by an employer as long as the employer was willing to provide data on the schedule of benefits and to bargain about changes in the schedule. He pinpointed the distinction as follows (JA 27):

> "Thus in each of these cases, unlike the instant one, we have an insurance program where not only is it the benefits that are of bargainable significance to the employees, but so are the premiums for as an expense to the employees they are deductible, presumably, from their wages. Thereby they are directly related to those wages. In a word, no one is, or could, argue that the portion of an employee's paycheck allocated to pay his insurance premium is an item of information to which neither he, nor his bargaining representative, would be entitled."

The Board refused to recognize any such distinction, holding that the costs even of a non-contributory plan were the equivalent of wages and consequently there was a mandatory duty to provide information with respect to such costs and presumably to bargain about them. The court of appeals, however, drew the same distinction as had the trial examiner (Pet. 22):

> "Moreover, we might take another step and agree with the trial examiner that the cost of plans to which employees contribute constitutes 'wages' by reason of the direct effect of each employee's contribution upon his pay check. It is quite another matter, however, to go further and endorse the Board's broad conclusion that the cost of a group employee insurance program defrayed entirely by the employer also constitutes 'wages' to employees. In the absence of any controlling authority or

> indeed, of any judicial authority cited or discovered by our own efforts, we decline to take that step."

In view of the well-accepted principle that refusal to furnish information pertaining to "wages" is *ipso facto* an illegal refusal to bargain, the trial examiner, Board, and court of appeals properly directed their attention to whether in fact employer payments to a noncontributory insurance program were "wages" within the meaning of the Act. The nature of that judgment did not turn on any consideration of the utility of such information to the union—the issue raised for the first time in the Board's petition—but upon its relation to "wages". Indeed, such a standard had expressly been repudiated by the Board in *Pine Industrial Labor Relations Committee*, 118 NLRB 1055, 1061,[2] where it stated:

> "In deciding this case we have not been unaware of the consideration that possession at the outset of bargaining of the facts about the employer's economic position may be helpful to the union in tailoring its wage demands to what the employer can reasonably pay and therefore make bargaining, perhaps, more realistic and successful. But our duty under the Act is here to determine whether the obligation of good faith bargaining has been met rather than to establish ideal bargaining conditions."

Here the Board is intimating that Respondent has violated the good faith bargaining requirements of the Act by removing a bargainable matter from the negotiating table. Indeed, this was another "inarticulate

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[2] Aff'd sub nom., *International Woodworkers* v. *N.L.R.B.*, 263 F. 2d 483 (CADC).

premise" of the Board's decision, for the cases which it relied upon in support of its holding, *Richfield Oil Corporation*,[3] and *Inland Steel Company*,[4] were cases turning upon the employers' steadfast refusal to discuss, respectively, a stock purchase plan for employees and a pension and retirement plan. This is, moreover, the thrust of a portion of the article by the present Solicitor General, cited in the petition (p. 11), who observed, 71 Harv. L. Rev. 1401, 1428:

> "In some of the cases the employer avowedly challenged the bargainability of the subject upon which information was withheld. In others he was obviously seeking to avoid negotiations upon the issue. In virtually all the cases, except those involving financial data, there could be no negotiation on the subject, in any sense of the term, until the information was supplied to the union." [Footnotes omitted.]

In view of Respondent's bargaining history with the union, particularly with respect to the negotiation of group insurance plans, the Board's theory strains the imagination. The record clearly establishes that respondent had negotiated such plans with the union in previous years, and once again reached agreement on a plan in the negotiations which gave rise to the instant unfair labor practice charge (JA 13, 14). Respondent always was willing to, and did, discuss the benefits under such plans and furnish whatever information was requested with regard to such benefits. Inasmuch as it never interposed the cost of premiums as the predicate to whatever counter offers it made to union

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[3] 110 NLRB 356, enf'd 231 F. 2d 717 (CADC).

[4] 77 NLRB 1, enf'd 170 F. 2d 247 (CA 7), cert. denied 336 U.S. 960.

proposals, the expense of such insurance was never drawn into issue. Under these circumstances, the Board's conjecture concerning the impairment of collective bargaining finds no support in the record.[5]

In reaching the sound conclusion that the cost of the insurance program did not constitute "wages",[6] the court could also have held that such "costs" are not "terms and conditions of employment"—another subject on which employers and unions are required to bargain under Section 8(d) of the Act. Had Respondent shifted its insurance plan to another carrier charging lower premiums—as the Union intimated it might ask the Company to do[7]—it is perfectly clear that unless the level of benefits were revised, the "terms and conditions of employment" would not have been altered in the slightest.

The Board's holding that the authorities relating to contributory plans are equally controlling in cases where the employee makes no contribution betrays a confusion between a bargaining relationship and a

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[5] As the trial examiner found (JA 30):

> "Actually the question of achieving better coverage at the same cost is academic to this case. For the employer, in bargaining with respect to insurance benefits, never claimed his inability to pay the cost of *any* benefit proposal presented (*supra*, p. 5). As the element of cost was, therefore, never injected into the bargaining demands, the Respondent's ability to pay them, or to pay greater costs for larger benefits, is not in issue and information with respect to his costs and his ability to pay them is not a necessity to bargaining." [Original emphasis.]

[6] See *United States* v. *Embassy Restaurant, Inc.*, 359 U.S. 29.

[7] See "Stipulation" (JA 41 at 43).

fiduciary one. Fiduciary status, with its attendant obligations of disclosure and accounting, is not properly a part of the arm's length relationship which the very term "bargain" indicates should exist between an employer and a union under the Act.

Accordingly, the law applicable to fiduciaries cannot be invoked in a case such as the instant one, where no trust arrangement is present. In a case such as *Swift*, however, the collective agreement establishes a limited trust, for the employer, by collecting the employees' share of the premium for transmittal to the insurance carrier and receiving possible dividends, owes his employees a duty of accounting. Since the employer is accountable to his employees for the receipts, *a fortiori*, he must disclose the amounts collected and transmitted.

Decisions saying that employee bargaining representatives are entitled to certain information do not mean that the courts view unions and employers as partners with certain fiduciary obligations springing from the bargaining relationship. Thus the cases holding that the certified representative has the right to know the wages of each individual in the bargaining unit, e.g., *Boston Herald-Traveler* v. *N.L.R.B.*, 223 F. 2d 58 (CA 1); *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938, are not really disclosure cases at all, for each employee in the bargaining unit already knows what his rate of pay is. But since the law makes the majority representative the exclusive representative of all the employees in the unit, irrespective of their wishes, it follows that such representative is entitled to the sum of all the wage information in the possession of each individual employee in order to bargain for the group

on this subject.[8] It is plain that divulgence cannot be compelled here under this standard, for no employee has knowledge of the premium cost of his insurance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[8] Similarly where the negotiated wage rates are based upon a piecework system or job evaluation plan, the bargaining representative is entitled to know the methods of calculation so as to be able to ascertain whether the contract wage rates have been complied with. *Taylor Forge & Pipe Works* v. *N.L.R.B.*, 234 F. 2d 227 (CA 7), cert. den'd 352 U.S. 942.